



**IN THE SUPREME COURT
OF THE UNITED STATES**

OCTOBER TERM, 1978

NO
78-1141

STEELCASE, INC.

Petitioner,

v.

DELWOOD FURNITURE COMPANY, INC.,

Respondent,

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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INDEX

	Page
TABLE OF CASES AND AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
FEDERAL QUESTION PRESENTED FOR REVIEW	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	6
I. THE FIFTH CIRCUIT HAS UPSET SEVENTY YEARS OF PRECEDENT AND CREATED CONFLICT BETWEEN CIRCUITS AND WITH THE SUPREME COURT WHERE NONE EXISTED BEFORE	6
A. The Limitation On Unpublished Foreign Patents As References Is Imposed By Statute	
B. Since 1909 Courts Have Held That That Which Is "Patented" In A Foreign Patent Is The Claimed Invention, So That Unpublished Foreign Patents Can Be Prior Art Only To The Extent Of The Invention Claimed In The Patent	8
C. Section 103 Does Not Permit An Expanded Reading Of A Foreign Unpublished Patent .	10
II. THE ISSUE OF INTERPRETING UNPUBLISHED FOREIGN PATENTS ARISES FREQUENTLY AND HENCE IS OF SUBSTANTIAL PUBLIC IMPORTANCE	11
III. PROPER APPLICATION OF LAW IN THIS CASE WOULD LEAD TO REVERSAL OF THE FIFTH CIRCUIT AND DISTRICT COURT	13
CONCLUSION	15

INDEX (CONT'D)

	Page
APPENDIX	A1
District Court Opinion Of July 2, 1974	A1
District Court Opinion Of February 11, 1975	A37
District Court Opinion Of July 2, 1976	A55
Fifth Circuit Opinion Of August 8, Rehearing Denied October 24, 1978	A68
Translated Belgian Patent 724,771	A75
Testimony of Edward Charles Levit	A84
Cover and Section 901.05 Of The Manual Of Patent Examining Procedure	A85
Journal Of The Patent Office Society, February 1972, Vol 54, pp 110-113	A90
Testimony Of Daniel Grisar	A95
Testimony Of George E. Pickering	A98
Testimony Of Vincent M. Foote	A100
United States Patent 2,967,565 to M. R. Schultz ..	A105
Photograph Of Estaban Chair	A114
Testimony Of Joseph H. Appleton	A115
Belgian Patent Law Case Reported In "L. Ingenieur Conseil" 1919	A117
United States Patent 3,669,499: Patent In Issue ...	A119

TABLE OF CASES AND AUTHORITIES

Cases	Page
<i>American Tri-Ergon Corp. v. Paramount Publix Corp.</i> 71 F.2d 153 (2d Cir. 1934)	8
<i>Bendix Corporation v. Balax, Inc.</i> , 421 F.2d 809, 812 (7th Cir. 1970) cert. den. 399 U.S. 911 (1970)	5, 7, 8, 12, 14
<i>Carter Products v. Colgate-Palmolive Company</i> , 130 F.Supp. 557, 566 (D.Md. 1955), aff'd. 230 F.2d 855 (4th Cir. 1956), cert. den. 352 U.S. 843 (1956)	5, 6, 7, 8
Ekenstam, Application of	4, 12
Fuge, Application of	5, 7, 8, 12
<i>General Electric Co. v. Alexander</i> , 280 Fed. 852 (2d Cir. 1922), cert. den. 260 U.S. 727 (1922)	8
<i>Graham v. John Deere Co.</i> , 383 U.S. 1 at p. 15(1966)	10
<i>Hamilton Laboratories, Inc. v. Massengill</i> , 25 F.Supp. 464 (E.D. Tenn. 1938) 111 F.2d 584 (6th Cir. 1940), cert. den 311 U.S. 688 (1940)	7
<i>Leeds and Catlin Co. v. Victor Talking Machine Co.</i> 213 U.S. 301, (1909)	8
<i>Permutit Co. v. Wadham</i> , 13 F.2d 454, 458 (6th Cir. 1926); rehearing denied 15 F.2d 20 (6th Cir. 1926) 5, 7, 8	
<i>Reeves Brothers, Inc. v. U.S. Laminating Corporation</i> , 282 F.Supp. 118, 136 (E.D.N.Y. 1968), aff'd 417 F.2d 869 (2d Cir. 1969)	5, 7, 8, 12
Statutes	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1338	3
35 U.S.C. § 102	15
35 U.S.C. § 102(a)	8
35 U.S.C. § 102(b)	2, 8
35 U.S.C. § 103	3, 15

	Page
Miscellaneous Citations	
Manual of Patent Examining Procedure, Section 901.05	11
Frederico, "Foreign Patent Manual", 54 "Journal of the Patent Office Society", pp. 102-125, 147-174, 360, February, March and May (1972)	11

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**PETITION FOR WRIT OF CERTIORARI TO
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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on August 8, 1978, holding United States Patent 3,669,499 invalid.

OPINIONS BELOW

An unreported Memorandum Opinion holding United States Patent 3,669,499 valid and infringed was entered July 2, 1974 by the United States District Court for the Northern District of Alabama, Southern Division (A 1).

A second unreported Memorandum Opinion holding said patent not misused by Plaintiff was entered by the same Court on February 11, 1975 (A 37).

A third unreported Memorandum Opinion holding the same patent invalid over Belgian patent '771 was entered by the same court on July 2, 1976 (A 55).

The reported Affirming Opinion of the United States Court of Appeals for the Fifth Circuit was printed on August 8, 1978 at 578 F.2d 74 (A 68).

JURISDICTION

Appellant seeks review of the Fifth Circuit Opinion dated August 8, 1978, for which a Petition for Rehearing was denied and entered on October 24, 1978. Jurisdiction is conferred on this Court by 28 U.S.C. 1254(1).

FEDERAL QUESTION PRESENTED FOR REVIEW

The question of law presented by this case has substantial impact and far reaching effect on the United States Patent Laws:

WHETHER THE TEACHINGS OF A FOREIGN PATENT AS A WHOLE, WHICH DOES NOT CLAIM THE INVENTION OF A UNITED STATES PATENT AND WHICH DID NOT BECOME A PUBLICATION UNTIL AFTER THE ISSUANCE OF THE U.S. PATENT, CAN BE USED TO INVALIDATE THE U.S. PATENT?

Contrary to the Fifth Circuit holding, Petitioner contends the teachings of an unpublished foreign patent as a whole cannot be used and that only the claimed invention constitutes prior art.

STATUTES INVOLVED

35 U.S.C.A. 102(b), at page 445:

§ 102. Conditions for patentability; novelty and loss of right to patent

A person shall be entitled to a patent unless

(b) the invention was patented or described in a printed publication in this or a foreign country or in

public use or on sale in this country, more than one year prior to the date of the application for patent in the United States, or"

35 U.S.C.A. 103, at page 715:

§ 103. Conditions for patentability; non-obvious subject matter

A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made."

STATEMENT OF THE CASE

This cause was originally tried under 28 U.S.C. 1338 from June 24 to July 2, 1974, on Petitioner Steelcase's complaint that Respondent Delwood, through its United Chair Division, had flagrantly infringed its United States Patent 3,669,499 (A 119) by copying Plaintiff's highly successful '451 Series "chair within a chair" shell chair. *The '499 patent covering that chair was originally held valid and infringed* (A 1).

Following a later patent misuse trial on which defendant was unsuccessful (A 37), Defendant appealed. During the course of that appeal, another attorney brought Belgian patent 724,771 (A 75) to Defendant's attention and Defendant obtained permission from the Fifth Circuit Court of Appeals to move for a rehearing. The rehearing, which was limited to a consideration of the Belgian patent, was granted and held on June 30 through July 2 of 1976. *On the basis of this newly discovered Belgian patent, the Court reversed its earlier*

validity finding (A 55), and the Fifth Circuit Court of Appeals affirmed (A 68).

Of utmost importance in this case is the following comparison of the chronological history of the patent in suit with that of the Belgian patent relied upon by the lower courts:

CHRONOLOGY

'499 Patented Invention	Belgian Patent
January 1968: invention conceived	Feb. 14, 1969: Patent granted kept secret — not yet prior art in the U. S. <i>Application of Ekenstam</i> , 256 F.2d 321, 322 (CCPA 1958).
April 1969: invention reduced to Practice	May 16, 1969: Patent open for inspection — in U.S. becomes prior art limited to what it claimed since it was still not a printed publication.
June 1970: Patented chairs sold publicly	
Dec. 30, 1970: '499 patent application filed	
June 13, 1972: '499 patent issued	August 2, 1972: Belgian Patent made a printed publication making it prior art as to what it <i>claimed and disclosed</i> , but not as to '499 patent which was filed and issued prior to this date.

This chronology establishes that at the time of filing of the '499 patent, the Belgian patent papers submitted by the Belgian patentee were only available in the Belgian Patent Office for copying. They did not constitute a printed publication until long after the '499 patented chair was invented and patented. Therefore under long established law the courts should have considered the Belgian patent as prior art only as to what it claimed, not for what the disclosure may have taught. *Carter Products v Colgate-Palmolive Company*, 130 F.Supp. 557, 566 (D.Md. 1955), aff'd. 230 F.2d 855 (4th Cir. 1956), cert. den. 352 U.S. 843 (1956); *Permutit Co. v Wadham*, 13 F.2d 454, 458 (6th Cir. 1926); rehearing denied 15 F.2d 20 (6th Cir. 1926); *Application of Fuge*, 272 F.2d 954, 956 (CCPA 1959); *Reeves Brothers, Inc. v U.S. Laminating Corporation*, 282 F.Supp. 118, 136 (E.D.N.Y. 1968), aff'd 417 F.2d 869 (2d Cir. 1969); *Bendix Corporation v Balax, Inc.*, 421 F.2d 809, 812 (7th Cir. 1970) cert. den. 399 U.S. 911 (1970).

The Fifth Circuit however did not look solely to the claimed invention of the Belgian Patent and what it might have taught to one skilled in the art at the time the '499 patented invention was made. Rather, it stated at page 79 of the Decision (A 73):

"In finding that the *teachings* of the Belgian patent as well as its *explicit claims* should have been available to a person of ordinary skill in the art, the trial court was not clearly in error." [emphasis added]

Appellant contends this use of the Belgian patent to be clearly erroneous as a matter of law and petitions for writ of certiorari. If this erroneous decision is left to stand, the question of how a foreign patent, which is not a publication, can be used as prior art will be put in turmoil.

ARGUMENT

I. THE FIFTH CIRCUIT HAS UPSET SEVENTY YEARS OF PRECEDENT AND CREATED CONFLICT BETWEEN CIRCUITS AND WITH THE SUPREME COURT WHERE NONE EXISTED BEFORE.

A. The Limitation On Unpublished Foreign Patents As References Is Imposed By Statute.

The Fifth Circuit misunderstood Plaintiff's argument relative to the Belgian patent. The decision states that Plaintiff was calling for a "provincial view" of foreign patents which view would subject them to a restrictive interpretation simply because they are foreign. This is not at all the case. Rather, the Belgian patent is a special type of patent, which for the purposes of this suit is not a publication, and therefore is limited in scope as a prior art reference *BY STATUTE*.

Sections 102 and 103 of the United States Patent Laws expressly treat foreign unpublished knowledge, such as unpublished patents, differently from unpublished knowledge within the United States and differently from printed publications. Whereas the statute establishes three categories of United States prior art, only two categories of foreign prior art are established. Any invention which is (1) known, (2) patented or (3) described in printed publications in the United States prior to the date of an invention or more than one year prior to the filing date of a U.S. patent constitutes effective prior art against such invention and any patent filed therein. However with respect to foreign prior art, *only* that which is (1) *patented* or (2) *described* in a printed publication abroad constitutes a prior art reference. In other words, that which is unpublished knowledge in a foreign country, but which is not patented or described in a printed publication, does not constitute prior art. 35 U.S.C. 102 (a) and (b); *Carter Products v. Colgate-Palmolive Company*, 130 F.Supp. 557, 566 (D.Md. 1955), *aff'd*. 230 F.2d 855 (4th Cir. 1956), *cert. den.* 352 U.S. 843 (1956).

recognizing such patents as prior art for only what is patented therein. Thus, 35 U.S.C. Section 102 (a) and (b) both refer to "patents" or "printed publications" as being prior art.

B. Since 1909 Courts Have Held That That Which Is "Patented" In A Foreign Patent Is The Claimed Invention, So That Unpublished Foreign Patents Can Be Prior Art Only To The Extent Of The Invention Claimed In The Patent

It was not Congress' intention to elevate unpublished foreign patents to equality with printed publications or to equality with public knowledge in the United States, since it is and always has been well settled law that nothing is to be treated as "patented" by a foreign unpublished patent except that which is actually claimed therein. *Carter v. Colgate-Palmolive Company*, supra; *Permutit Co. v. Wadham*, supra; *Application of Fuge*, supra; *Reeves Brothers, Inc. v. U.S. Laminating Corporation*, supra; *Bendix Corporation v. Balax, Inc.*, supra.

As far back as 1909, the Supreme Court has ruled that that which is patented in a foreign patent is the claimed invention, not everything disclosed in the patent document. *Leeds and Catlin Co. v. Victor Talking Machine Co.*, 213 U.S. 301, (1909). See also *American Tri-Ergon Corp. v. Paramount Publix Corp.*, 71 F.2d 153 (2d Cir. 1934), reversed on other grounds, 294 U.S. 464, (1935); and *General Electric Co. v. Alexander*, 280 Fed. 852 (2d Cir. 1922), cert. den. 260 U.S. 727 (1922). Although the question arose in a different context in these cases, the courts still had to determine what was "patented" in a foreign patent. The Supreme Court and the Second Circuit looked to the claimed invention to answer that question. This precedent has been followed in later cases in the same context as the case at bar, i.e. *Carter*, *Permutit*, *Fuge*, *Reeves* and *Bendix*, supra. Thus, it has been clearly established that by statute special types of patents such as the Belgian patent, which was special

because it was not a printed publication before the '499 patent was filed, cannot be used in the same way as an ordinary published and printed foreign patent.

It is error as a matter of statutory law for the Fifth Circuit Court to have held that knowledge contained in the disclosure but not in the claims of an unpublished foreign patent is prior art that can be used to invalidate a U.S. patent. In reaching this holding, the Court erroneously stated:

"The state of the art does not depend on the provincial view that the available knowledge is only that published in one locality or contained only in domestic patents. The prior art is all of that knowledge that would have been available to any person having ordinary skill in the art. This hypothetical person of ordinary skill is not deemed to be omniscient, but he must be assumed to share the knowledge available in his art (to persons of ordinary skill) *wherever it may originate.*" [emphasis added] (A 73).

Contrary to this decision as a matter of statutory law, the hypothetical person of ordinary skill should *not* be assumed to share in foreign public knowledge wherever it may originate. Foreign knowledge can be prior art only if it is described in a printed publication or explicitly claimed in an unpublished foreign patent. Therefore, it is also error as a matter of statutory law for the Fifth Circuit to conclude:

"In finding that the teachings of the Belgian patent as well as its explicit claims should have been available to a person of ordinary skill in the art, the trial Court was not clearly in error." (A 73)

The above statements by the Fifth Circuit Court in effect equate unpublished knowledge abroad with a printed publication or with public knowledge in the United States. This is a clear contravention of the United States Patent Statutes

and of seventy years of precedent and should be reviewed and reversed.

C. Section 103 Does Not Permit An Expanded Reading Of A Foreign Unpublished Patent

Section 103 of Title 35 allows a court to invalidate a patent even if it is not identically disclosed as set forth in Section 102, if the differences between the subject matter patented and the prior art are such that the patented subject matter as a whole would have been obvious to one skilled in the art at the time the invention was made. The Fifth Circuit stated in distinguishing Section 103 from Section 102 that:

"Obviousness, on the other hand, may be found from the *teachings of the whole of the prior art* and the improvements on those teachings that would be obvious to the hypothetical person of ordinary skill in that art." (A 73) [emphasis added].

Based on the Court's later statement that "the teachings of the Belgian Patent as well as its explicit claims should have been available" as prior art, it appears that the Fifth Circuit erroneously interpreted Section 103 as permitting it to expand its reading of the Belgian Patent beyond the limitations of Section 102. This is clearly erroneous.

The words "prior art" used in Section 103 refer to that which is legally "prior art" as defined by Section 102. *Graham v John Deere Co.*, 383 U.S. 1, at p. 15 (1966). One would not be allowed to use foreign public knowledge as prior art under Section 103 when it is definitely not prior art under Section 102 (a) or (b).

So too, in determining whether the differences between the prior art and the '499 patent would have rendered the '499 patent obvious in 1969, the Fifth Circuit should have looked no further than the Belgian claimed invention and what it taught in the context of the state of the art and level of skill. It should not have looked to the Belgian Patent teachings as a whole.

II. THE ISSUE OF INTERPRETING UNPUBLISHED FOREIGN PATENTS ARISES FREQUENTLY AND HENCE IS OF SUBSTANTIAL PUBLIC IMPORTANCE.

This case is of substantial public importance on two levels. First, it is of public concern that the '499 patent, which covers the most commercially successful invention ever brought to the office furniture industry, (Levit, A 84), has been invalidated through improper use of an unpublished foreign patent. Invention in the office furniture industry and the dissemination of information concerning the same through patents should not be discouraged through improper use of unpublished foreign patents as prior art references.

Secondly, the issue of unpublished foreign patents as prior art arises frequently, both in the United States Patent Office and in the Courts. Section 901.05 of the Manual of Patent Examining Procedure used by all United States Patent Office Examiners relates exclusively to foreign patents. The fact that some foreign patents are not available as printed publications is also specifically discussed (A 85).

The Manual also refers to and incorporates an article by Pasquale J. Federico entitled "*Foreign Patent Material*" and published in the "Journal of the Patent Office Society" Volume 54, pp. 102-125, 147-174, 360, February, March and May of 1972 (pp. 110 to 113 included in App. at A 90). This article, specifically discusses on pages 110 and 111 two possible different effective dates for use of foreign patents as references:

"The published specifications of foreign patents with which we are concerned have a dual aspect; they are printed publications and at the same time they represent foreign patents. There may be, and usually are, two different effective dates for reference purposes, one the effective dates when used as a printed publication, and the other the effective date when used as a foreign patent. (The term "effective date" is here

used to indicate the date we consider the document effective for the purpose we intend to use it; the same date may have little or no significance in the country of origin.) When used as printed publications everything disclosed in the specification is available for use, and the laws under which they were issued are irrelevant. When used as foreign patents some matters disclosed in the specification might not be available for use (see below), and complexities of foreign laws may arise in interpretation and in determining the effective date."

In the present case an understanding of the complexities of the foreign law is necessary for interpretation of the Belgian Patent. Plaintiff-Petitioner showed by preponderance of un rebutted evidence that under the Belgian Laws the invention as claimed in the Belgian patent was not the invention of the U. S. patent in suit. However, the Fifth Circuit Court of Appeals completely ignored the Belgian law by its holding that "the teachings of the Belgian patent as well as its explicit claims" should be considered as having been available as prior art in determining the obviousness issue.

This holding is completely opposite to the Patent Office practice as expressed above in the Federico article and adopted by the Patent Office in its Manual of Patent Examining Procedure and is completely opposite to law as heretofore established by the courts. *Fuge*, supra; *Bendix*, supra; *Reeves*, supra; and *Eckenstam*, supra. Therefore, to let this decision stand would set a completely new precedent that an unpublished foreign patent can be used for all purposes, i.e. as a printed publication or as a patent, as of the date it was granted. Inventors filing U.S. patent applications well prior to the publication of foreign patents would be robbed of their property rights through such an expanded interpretation of unpublished foreign patents. Such a result is clearly contrary to statute and should be reversed.

This is an issue of pressing importance to the promotion of progress of science and the useful arts, and should be reviewed by this Court.

III. PROPER APPLICATION OF LAW IN THIS CASE WOULD LEAD TO REVERSAL OF THE FIFTH CIRCUIT AND DISTRICT COURT.

If one makes a statutorily proper interpretation of the Belgian patent, looking to the claimed invention rather than to extraneous teachings of the patent, it is impossible to find that the Belgian patent in any way suggests, either alone or in combination with other prior art, the patented "chair within a chair" invention of the '499 patent. The District Court originally found that in contrast to prior art single shell chairs, or prior double shell chairs where both shells are structural and are unitized to act as a single shell, the '499 patented chair comprises a "chair within a chair" in which the "inner chair" is a structurally complete shell chair, comprising an upholstered, load bearing structural inner shell, having sufficient thickness and rigidity that it alone provides an integral seat and back capable of carrying the loads imposed on a chair in normal usage. The inner chair is positioned within an "outer appearance chair" comprising a decorative non-load bearing outer shell having a decorative exterior appearance and having sufficient thickness and rigidity only to hold a desired design configuration. (A 21) The chair within a chair concept makes it possible to design comfort and strength into the chair independently of ornamental limitations, and visa versa (A 29, A 30).

The Belgian invention, i.e. its claimed concept, is the pushing of one plastic shell over the other and fastening them to each other and to a foot (Grisar, A 95). Such concept teaches one skilled in the art at the time the present invention was made that the Belgian Patented chair is a unitized composite shell in which the two shells are both load bearing and structural in function (Pickering, A 99).

There is nothing in the Belgian claimed invention that would lead one to believe the Belgian chair is any different from the Hawley chair over which the District Court held the present patent to be valid. In Hawley, two shells are secured to each other and to a foot with the assistance of a press (Foote, A 103). Both shells are structural and act together to create a composite shell (Foote A 100). Similarly, other prior art chairs utilize two shells in which both are load bearing structural members which act together to create a composite shell (District Court holding at A 27 and A 28, referring to the Estaban chair A 114, and the Schultz chair A 105).

There is no contrary testimony as to what one would have learned from the Belgian claimed invention. Defendant's witnesses Foote and Appleton never testified as to what one skilled in the art would have inferred from the claimed invention of the Belgian patent at the time the '499 patented invention was made. Both Foote and Appleton admitted that they had no idea as to what was even patented (claimed) in the Belgian patent (Foote, A 103, Appleton, A 115).

Defendant attempted to overcome these deficiencies in its case by arguing that the so-called omnibus claim, claim 22 of the Belgian patent, means that everything shown or described is "patented" in the Belgian patent. Defendant's contention is in error since the courts should have looked to Belgian Law to determine what is patented in a Belgian patent, just as the Seventh Circuit Court looked to German Law to determine what was patented in a German Gebrauchsmuster, *Bendix v Balax*, supra.

In Belgium, an omnibus claim only covers that which the inventor expressly states in his patent he intends to protect as his invention (Grisar, A 95). In the Belgian case discussed in "L'Ingenieur Conseil" 1919 (PX 266, A 117). An omnibus claim was held to be of no effect because there was no statement in the specification of what the inventor intended to protect as his invention (ibid.). Even if the Belgian patent

did clearly and concisely describe the "chair within a chair" concept, it would not be claimed in the Belgian patent without a clear statement of the inventor's intent to cover that concept (Grisar A 95). Therefore, had the Fifth Circuit Court of Appeals applied as prior art only the invention which was claimed by the Belgian patent, the patent in suit would have been held valid.

CONCLUSION

The Fifth Circuit Court of Appeals, by affirming the District Court's reliance on the teachings of the unpublished Belgian patent as a whole, has upset seventy years of precedent and has created a conflict between the circuits and with prior decisions of the United States Supreme Court. Under 35 U.S.C. Section 102 and 103, unpublished foreign patents are available as references only to the extent of the invention claimed therein. The teachings of such unpublished patents as a whole are not available as prior art references.

Because this issue arises frequently, both in the United States Patent and Trademark Office and in the courts, its review by the United States Supreme Court is imperative. Such review will lead to a reversal of the Fifth Circuit Court of Appeals in the present case, since reference to the claimed invention of the Belgian patent teaches one skilled in the art no more than that which is taught by other prior art considered by the United States District Court for the Northern District of Alabama in originally holding United States patent 3,669,499 valid. Writ of certiorari to the Fifth Circuit Court of Appeals is respectfully solicited.

Respectfully submitted,

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